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No. 89-2003

In The
Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS BOARD OF REGISTRATION
IN MEDICINE,
PETITIONER,

v.

LAWRENCE KVITKA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

**Brief for the respondents
in opposition to petition
for certiorari**

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BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent respectfully requests that this Court decline to issue a Petition for a Writ of Certiorari to review the judgment in this case of the Supreme Judicial Court of Massachusetts issued March 27, 1990.

Constitutional and statutory provisions

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Mass. G.L. c. 112, § 5 (1988 ed.) provides in relevant part:

> The board [of registration in medicine] may, after a hearing . . . revoke, suspend, or cancel the certificate of registration, or reprimand, censure, impose a fine not to exceed ten thousand dollars for each classification of violation, require the performance of up to one hundred hours of public service, in a manner and at a time and place to be determined by the board, require a course of education or training or otherwise discipline a physician . . .

Mass. G.L. c. 112, § 64 (1988 ed.) provides in relevant part:

> The supreme judicial court, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A . . .

Statement of the case

Respondent refers to the statement of facts set forth in the opinion of the Massachusetts Supreme Judicial Court located in the Petition at pages 1a - 7a.

Reasons why the Petition should be denied

I. The Massachusetts Supreme Judicial Court Correctly Applied United States v. Halper.

The Massachusetts Supreme Judicial Court ("the SJC") correctly applied the United States Supreme Court's decision in *United States v. Halper*, __ U.S. __, 109 S.Ct. 1892 (1989) to the present case. In *Halper* the defendant physician had been convicted of making false claims in connection with the federal Medicare program. He received a two year jail sentence and a $5,000 fine. Following the criminal conviction, the government imposed civil fines in the amount of $130,000. This Court unanimously ruled that the constitutional guarantee against double jeopardy was violated by the imposition of a civil fine following a

criminal conviction. It recognized "that civil proceedings may advance punitive as well as remedial goals" and explained:

> ...a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment... a civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can be explained only as **also** serving either retributive or deterrent purposes, is punishment. 109 S. Ct. at 1901-02. (emphasis added).

The SJC determined that the fine imposed on Dr. Kvitka was barred by *Halper* because the Board of Registration in Medicine ("the Board") in its Final Decision and Order explicitly stated that its purpose in imposing the fine was to punish Dr. Kvitka and deter future wrongdoers. In its Final Decision and Order the Board characterized Dr. Kvitka's actions as "a flagrant abuse of the public trust" (Petition at p. 34a) and stated that "misconduct in the area of prescription practice will not be treated lightly" (Petition at p. 34a). The SJC found that these statements "indicate both a desire on the part of the board to penalize the physician and a

warning to other physicians to refrain from engaging in similar conduct." 407 Mass. at 145, 551 N.E.2d at 918. As a result, the SJC determined the imposition of the fine was punitive.

Petitioner, citing footnote seven of *Halper*, __ U.S. at __, 109 S.Ct. at 1901[1], claims the SJC erred by considering the Board's stated intention rather than the purposes actually served by the sanction. *Halper* provides that it is the character of the actual sanction imposed that is to be evaluated. __ U.S. at __, 109 S.Ct. at 1901. A fair reading of footnote 7 in its entirely reveals that it was directed to a governmental authority's attempt to cloak punishment under the guise

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[1] Footnote 7 reads:

> This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment. [citations omitted] Rather, we hold that merely in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying proceeding giving rise to the sanction, that must be evaluated.

of a civil sanction. It does not apply to those situations in which the sanctioning authority squarely admits its intention is to punish and deter.

The purpose actually served by imposing a fine on Dr. Kvitka was to punish him. The purpose of proceedings by the Board of Registration in Medicine is not to take retribution against a physician, but rather to protect the public from a physician who lacks competency or integrity. *Feldstein v. Board of Registration in Medicine*, 387 Mass. 339, 341, 439 N.E.2d 824, 826 (1982); *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 527-28, 392 N.E.2d 1036, 1041 (1979). However, once the Board revoked Dr. Kvitka's license to practice medicine he no longer posed any threat to society and there was no further sanction the Board could impose to protect the public. Where the Board revoked his license and at the same time imposed a fine, the fine can only be characterized as a retributory act rather than one designed to protect the public. As a result, the

'purposes actually served' by the fine are punitive.

II. The Massachusetts Supreme Judicial Court Correctly Held that the Board's Stated Intention to Disgorge Illicit Profits from Kvitka Was Not a Legitimate Remedial Purpose, but, Rather, was Punitive.

Respondent incorrectly assigns error to the SJC's finding that "[e]ven if, as the board suggests, the fine amounted to a forced disgorgment of illicit profits, that purpose cannot be considered remedial under the double jeopardy clause." 407 Mass. at 146, 551 N.E.2d at 918. The SJC reasoned that "[t]his is not a case where the government has suffered a loss because of the physician's fraud, [citing *Halper*] or where there is an identifiable victim who has suffered damages due to the physician's actions." Id.

Disgorgment provides restitution to persons harmed by illegality. In *Tull v. United State*s, __ U.S. __, 107 S.Ct. 1831 (1987) this Court explained:

> An action for disgorgment of improper profits... is a remedy only for restitution--a more limited form of penalty than a civil fine. Restitution is limited

> to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant."

__ U.S. at __, 107 S.Ct. at 1839, quoting from *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed 1332 (1946). Thus, the SJC correctly reasoned that because there was no identifiable victim in Dr. Kvitka's crime to return disgorged funds to, any fine based upon disgorgment of illicit profits could not be considered remedial. The Board itself suffered no losses from Dr. Kvitka's wrongdoing and as a result may not profit from it.

III. The Massachusetts Supreme Judicial Court's Decision was based on a Narrow Application of Facts and Poses Little Threat to Law Enforcement Proceedings.

The Petition for Writ of Certiorari should be denied because it is based on a narrow application of law in unusual circumstances. The Board explicitly asserted its purpose in assessing the fine was to punish and deter other physicians. As the Board stated its

punitive intent, the SJC correctly held that jeopardy should attach.

The SJC's holding is narrow. It does not bar the Board from levying all fines, but merely those that are punitive in nature. For these reasons, review by the Supreme Court is not warranted.

Finally, review is not warranted because the specific fine in this case was clearly punitive, not remedial. The cases relied on by the Petitioner for the proposition that all civil sanctions are remedial involve rough reimbursement **to the government** for **its** financial losses, from Medicare or Medicaid, from the Internal Revenue Service, and for investigatory expenses. The present case does not involve financial loss suffered by the government. This distinction between "reimbursement" to the party suffering a loss, which is properly remedial, and straightforward " disgorgment" of ill-gotten gains, which only goes to punish the wrongdoer, is the heart of the legal doctrine at issue. Reimbursement goes to right a wrong. Pure

disgorgment goes only to prove that crime does not pay. The former is a "remedy;" the latter is a "punishment."

CONCLUSION

For all the above reasons the Petition for a Writ of Certiorari should be denied.

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